U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDE BALDWIN and U.S. POSTAL SERVICE,
POST OFFICE, Capitol Heights, Md.

Docket No. 96-1570; Submitted on the Record;
Issued May 27, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective September 17, 1995 based upon his refusal of suitable work.

Appellant, a custodian in his mid to late thirties, sustained multiple back injuries between December 1984 and December 1987 which were accepted by the Office for back strains.[1] Appellant stopped work on December 13, 1987, after a lifting incident on December 10, 1987. He was treated by Dr. Ronald Hairston, a family practitioner and general surgeon, who supported total disability from work. Results of a computerized tomography (CT) scan performed on February 19, 1988 revealed mild degenerative disc disease of the spine and a "mild central disc herniation at the L4-5 level" without nerve root compression. Dr. Hairston recommended neurosurgical evaluation on account of the documented herniated disc.

Appellant was placed on the periodic rolls for wage-loss compensation and was referred to a vocational rehabilitation counselor. While appellant was offered a clerical type of position,

[1] Under claim number A25-264623, the Office accepted appellant's claim for a back strain due to carrying a desk up the stairs with the assistance of one employee. While appellant continued to work initially, he was off work for approximately four weeks in January and February 1985, when he returned to light-duty work. Under claim number A25-283788, the Office accepted that appellant sustained a further back strain on November 17, 1985 when he slipped on a newly waxed floor. Appellant was off work for intermittent periods between November 18, 1985 and February 11, 1986. Under claim number A2-314772 the Office accepted that appellant sustained a back strain on December 10, 1987, from lifting a sofa with the assistance of an employee. The Office combined the claims into one single claim under the latter claim number A2-314772.

approved by his physician, he failed to report to work on the effective date, May 8, 1989. Subsequent diagnostic testing indicated a lack of herniation.[2]

The Office referred appellant to Dr. William Gentry, a Board-certified orthopedic surgeon, who evaluated appellant on January 5, 1990. Dr. Gentry reported appellant's current complaints of back pain with lifting or bending activities, and his findings of negative straight leg raising. He diagnosed chronic low back strain and stated that the December 10, 1987 lead to a probable permanent aggravation of his underlying back condition. Dr. Gentry noted that appellant could work with restrictions against heavy lifting and bending, kneeling, climbing, or stooping. No action, however, was taken to return appellant to work at this time. Almost three years later he reported a neck injury when he fell down the stairs, with reported aggravation to his back.

Upon review of the record in September 1993, the Office requested updated medical information from appellant. He provided a report from Dr. Hairston indicating appellant continued to be disabled from work, with an attached report from a repeat MRI performed on November 11, 1993. Based on the results which showed a possible "mild disc herniation on the right side at L5-S1" foraminal in location, Dr. Hairston recommended a neurosurgical consultation.

The Office referred appellant to Dr. Jeffrey Goltz, a Board-certified orthopedic surgeon, who evaluated appellant on November 17, 1993. Dr. Golz diagnosed chronic low back strain with minimal degenerative disc disease and a fractured neck unrelated to his employment-related injuries. He released appellant to work in a light-duty job with a 30-pound lifting restriction and no climbing or crawling. In a subsequent work restriction evaluation dated January 4, 1994, Dr. Goltz noted additional work restrictions of working in a cold, damp environment, or high speed work. He noted that appellant could return to full-time work as soon as an appropriate position was available, and repeated his 30-pound lifting restriction, with no bending or squatting activities. Dr. Goltz noted that he could perform limited kneeling and twisting activities.

In a December 14, 1994 report, Dr. Hairston stated that he felt appellant had a herniated disc and that appellant could perform part-time work with a five-pound lifting restriction, and no bending, stooping, crawling, or reaching above the shoulders.

In the spring of 1995 appellant underwent vocational testing through the assistance of a vocational rehabilitation counselor, who visited the work site and assisted in identifying a suitable light-duty job. By an offer of employment dated May 11, 1995, appellant was offered a modified custodial laborer position with duties of sweeping, cleaning, and policing of a small heated annex with two offices, two restrooms, one swing area and a work floor. The position description noted that the work restrictions provided by Dr. Goltz would be in effect. On May 23, 1995 appellant stated that he preferred to undergo further evaluation, including a

[2] A magnetic resonance imaging (MRI) scan of the lumbar spine performed on December 17, 1989 was interpreted by a Board-certified radiologist as showing a lack of herniation.

neurologic evaluation, before signing the job offer. The vocational rehabilitation counselor reported appellant's lack of interest in returning to work on account of his continued back pain.

On June 7, 1995 the Office informed appellant that the proposed position was considered suitable and provided appellant with 30 days to submit a reason for a refusal of the position. The Office advised appellant that his wage-loss compensation benefits would be terminated upon a finding that his refusal was not justified. On August 21, 1995 the Office confirmed by telephone conversation that the position remained available to appellant. By decision dated August 23, 1995, the Office terminated appellant's wage-loss compensation benefits effective September 17, 1995 for refusal to accept suitable work.

Appellant requested reconsideration of the Office's August 23, 1995 decision, and agreed to work six hours per day. A letter from the vocational rehabilitation counselor confirmed appellant's interest in working six hours per day with wage-loss compensation paid for the remaining two hours.

By decision dated January 25, 1996, the Office denied appellant's request for review of the merits of his claim on the grounds that he did not advance a point of law or fact not already considered by the Office, nor did he submit new and relevant evidence.

The Board finds that the Office improperly terminated appellant's compensation benefits effective September 17, 1995.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[3] Under section 8106(c)(2) of the Federal Employees' Compensation Act,[4] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[5] The Board has recognized that section 8106(c) serves as a penalty provision as it may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment and, for this reason, will be narrowly construed.[6] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[7]

Based on the lack of rationale provided by Dr. Hairston, to establish appellant's inability to return to light-duty or full-duty work, the Office referred appellant for evaluation to Dr. Jeffrey Goltz, a Board-certified orthopedic surgeon. Dr. Goltz evaluated appellant in

[3] *David W. Green*, 43 ECAB 883 (1992).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987); *Herman L. Anderson*, 36 ECAB 235 (1984).

[6] *Stephen R. Lubin*, 43 ECAB 564 (1992).

[7] *See John E. Lemker*, 45 ECAB 258 (1993); *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

November 1993 and diagnosed chronic low back strain with minimal degenerative disc disease, with a recommendation to return to full-time work with a 30-pound lifting restriction. In a separate work restriction evaluation form completed in January 1994, Dr. Goltz noted that appellant could work full time, and that while he could not perform activities involving bending or squatting, he could perform limited kneeling or twisting activities. In May 1995 the employing establishment offered appellant a full-time modified custodial job, which involved sweeping, cleaning, and policing a small annex. The job offer listed the work restrictions provided by Dr. Goltz, who had evaluated approximately one and a half years prior to the job offer. As stated above, as the suspension or termination of benefits based on the refusal of suitable work serves as a penalty provision, it should be narrowly construed. Because of the one and a half-year gap in time between the evaluation upon which the work restrictions were based and the actual job offer with the work restrictions implemented, the Board finds that the evidence does not support that the position was suitable. In addition, between the time of the work restrictions provided by Dr. Goltz and the job offer, the Office received a report from appellant's attending physician, Dr. Hairston, with greater restrictions than those proposed by Dr. Goltz and used for the job offer. Under these circumstances, the Board finds that the evidence does not fully establish appellant's ability to perform the job which was offered to him in May 1995. Accordingly, the Board finds that the Office improperly terminated appellant's compensation benefits for failure to accept the suitable position.

The decisions of the Office of Workers' Compensation Programs dated August 23, 1995 and January 25, 1996 are hereby reversed.

Dated, Washington, D.C.
May 27, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member